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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

DAVID DULAN,

Respondent,

v.

FELIX ECKERT,

Appellant.

F076927

(Super. Ct. No. 17CEFL05560)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Lisa M. Gamoian, Judge.

Felix Eckert, in pro. per., for Appellant.

No appearance for Respondent.

-ooOoo-

Appellant, Felix Eckert, and respondent, David Allan Dulan, filed domestic violence restraining orders against each other—Eckert in Butte County and Dulan in Fresno County. Coincidentally, the respective hearings to determine whether they should be entitled to permanent restraining orders were set for the same day in the different

* Before Levy, Acting P.J., Franson, J. and Smith, J.

counties. Eckert filed a request to continue the hearing in Dulan's case in Fresno County Superior Court so that he could attend the hearing in his case in Butte County Superior Court. The request was denied. The court held the hearing, at which Eckert did not appear, and granted Dulan's request for a permanent domestic violence restraining order. Eckert appeals, claiming the court abused its discretion in denying his request to continue the hearing. Upon review, we find the court erred in denying the continuance to which Eckert was entitled as a matter of right and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Dulan petitioned for a temporary restraining order against Eckert on September 19, 2017, in the Fresno County Superior Court. The court denied the request for a temporary restraining order but set a hearing on a permanent restraining order for October 11, 2017. On September 21, 2017, Eckert obtained a temporary restraining order against Dulan in the Butte County Superior Court. A hearing on that permanent restraining order request was also set for October 11, 2017.

On October 10, 2017, at 8:00 a.m., Eckert filed a request to continue the October 11, 2017, Fresno County hearing. In the request, Eckert checked the box that he was the restrained party, and that it was his first request to continue the hearing. He also noted that the hearing date conflicted with the hearing date set for his restraining order application in the Butte County Superior Court. Accordingly, he requested that the hearing be postponed to a later date. The order was denied.¹

The Fresno County Superior Court held the restraining order hearing in Dulan's case as scheduled on October 11, 2017. The court found there was "no good cause for respondent [Eckert] not to be present," proceeded to hold the hearing, and granted

¹ The only evidence of the denial of the request is a summary entry on the court docket. To the extent there was a hearing or a written order on the request, it was not included in the appellate record.

Dulan’s request for a permanent restraining order that would remain in effect for one year.

On December 15, 2017, Eckert requested that the court dismiss the restraining order. After hearing from the parties, the court denied the request and the restraining order against Eckert remained in full force and effect. Eckert then filed the instant appeal.

DISCUSSION

Eckert’s notice of appeal is directed to the “[j]udgment after court trial.” Although the notice appeals the judgment entered by the trial court, the relief sought by Eckert’s brief is directed towards the trial court’s denial of his request to grant a continuance of the hearing. A ruling on a motion for a continuance is not ordinarily an appealable order. (See Code Civ. Proc., § 904.1.²) The failure to grant the requested continuance is reviewable on appeal from the judgment. (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527 (*Freeman*); *Cooper v. Deon* (1943) 58 Cal.App.2d 789.) Accordingly, we have authority to review the failure to grant the continuance as part of our review of the judgment.

Trial courts generally have broad discretion in deciding whether to grant a request for a continuance. (*Freeman, supra*, 192 Cal.App.4th at p. 527; *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.) However, “[t]he trial judge must exercise his discretion with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error. [Citations.]” (*Oliveros, supra*, at p. 1395.) “[A]n abuse of discretion results in reversible error only when the denial of a continuance results in the denial of a fair hearing, or otherwise prejudices a party.” (*Freeman, supra*, at p. 527; *In re Marriage of Johnson* (1982) 134 Cal.App.3d 148, 155 [denial of request for continuance, even if in

² All further references are to the Code of Civil Procedure, unless otherwise stated.

error, is only reversible if it resulted in a miscarriage of justice].) “However, some statutes make continuances mandatory and, therefore, divest the trial court of its usually broad discretion.” (*Freeman, supra*, at p. 527.)

1. *Mandatory Right to a Continuance*

Civil harassment restraining orders are governed by section 527.6. In 2011, the court in *Freeman* reviewed section 527.6 and determined that “[n]othing in [that] section mentions a *right* to a continuance.” (*Freeman, supra*, 192 Cal.App.4th at p. 528, original italics.) At the time that *Freeman* opinion was issued, section 527.6 provided that: “Within 15 days, or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued, a hearing shall be held on the petition for the injunction.” (§ 527.6, subd. (d).)

Section 527.6 was amended, effective January 1, 2016, to state “[t]he respondent shall be entitled, *as a matter of course*, to one continuance, for a reasonable period, to respond to the petition.” (§ 527.6, subd. (o), italics added.) In addition, the court could also grant a continuance request from either party on a showing of good cause. (*Ibid.*, subd. (p)(1).) Further, “[i]f the court grants a continuance, any temporary restraining order that has been granted shall remain in effect until the end of the continued hearing, unless otherwise ordered by the court.”³ (*Ibid.*, subd. (p)(2).)

Freeman compared the absence of language granting a continuance as a matter of right in the civil harassment restraining order statute to similar but unrelated family law restraining order and general civil injunctive relief statutes. (*Freeman, supra*, 192 Cal.App.4th at pp. 527–528.) The court noted that “[t]he right to a mandatory

³ The California Legislature also added substantially similar language to several other restraining order statutes providing the respondent one continuance to the hearing as a matter of course. (See Assem. Bill Nos. 494 & 1081 (2015 Reg. Sess.); Code Civ. Proc. §§ 527.8, subds. (o)–(p), 527.85, subds. (o)–(p); Fam. Code, § 245, subds. (a)–(b); Welf. & Inst. Code, §§ 213.5, subd. (c), 15657.03, subds. (m)–(n).)

continuance is noticeably absent from section 527.6, and if the Legislature had intended to create such a right, it easily could have done so in this later enacted statute.” (*Id.* at p. 529.) That is precisely what has happened. The recent amendments to section 527.6 removed the discretion from the court with respect to granting the respondent’s first request to continue the hearing.

In requesting the continuance of the hearing, Eckert filed the approved Judicial Council of California form, DV-115, and checked the box indicating that he was the respondent, and that it was his first request to continue the hearing.⁴ Based on the information contained in the request, Eckert was entitled to a continuance as a matter of right. “If the trial court was aware of [Eckert’s] right to a continuance, it was duty bound to rule accordingly when a continuance was requested. If the court was not aware of this right, that may be unfortunate but certainly not a sufficient ground to affirm a clearly erroneous ruling.” (*Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 864–865.) Accordingly, the court lacked discretion to decline Eckert’s request and we next turn to whether the denial of the continuance resulted in reversible error.

2. *Reversible Error*

A judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial. (Cal. Const., art. VI, § 13⁵; Code Civ. Proc., § 475⁶.) Even

⁴ Eckert also checked the box that good cause existed for the continuance based on the conflicting hearing on his restraining order hearing in Butte County on the same date. While not relevant to the present appeal, we question why the showing of good cause by Eckert was alternatively not sufficient to grant the continuance.

⁵ “No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.)

⁶ “The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court,

if the trial court possesses discretion to grant or deny a continuance, “[t]he trial judge must exercise his discretion with due regard to all interests involved. The denial of a continuance which has the practical effect of denying the applicant a fair hearing is often held reversible error. [Citations.]” (*Cotton v. StarCare Medical Group, Inc.* (2010) 183 Cal.App.4th 437, 445, citing *Cohen v. Herbert* (1960) 186 Cal.App.2d 488, 494.)

Eckert describes how, by denying the continuance, he was unable to adequately review the allegations made against him or to attend the hearing thereby preventing him from testifying or otherwise presenting evidence. Eckert was not present at the hearing, and the court, relying solely on the evidence presented by Dulan, granted Dulan’s request and issued a restraining order to remain in effect for the period of one year. The inability to defend his interests at the hearing denied Eckert the right to a fair hearing.

Because Eckert was denied the continuance to which he was entitled as a matter of course, we find it necessary to order a new hearing to consider whether the restraining order should be made permanent. In that hearing, Eckert should be afforded the opportunity to present written evidence as well as oral testimony from himself and other witnesses. However, we are not inclined to immediately dissolve the current protective order. Although Dulan did not accompany his request for a temporary restraining order with sufficient evidence to persuade the court to grant the application, Dulan did present sufficient admissible evidence at the October 11, 2017 hearing to support a permanent order. Accordingly, we will leave the protective order in force up to 30 days after

does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.” (§ 475.)

issuance of this court's remittitur. During that time, the trial court shall hold a hearing on whether that order should be extended.

DISPOSITION

The judgment is reversed, and the case is remanded to the trial court with instructions to hold a new hearing within 30 days after issuance of this court's remittitur, if Dulan still desires a protective order, at which hearing both parties shall be allowed to present oral as well as written evidence. It is further ordered the protective order remain in force until the conclusion of this new hearing or 30 days after the issuance of the remittitur, should no such hearing take place. Each party to bear his own costs on appeal. (Cal. Rules of Court, rule 8.278, subd. (a)(5).)